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No. 75-52

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN SAMUEL AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Court of Claims erred in dismissing his suit for correction of his military records and back pay.

In June 1965, petitioner, who was serving his third enlistment in the Navy, was jailed on drug-trafficking charges by Mexican authorities while he was in Tijuana, Mexico. He was subsequently tried and convicted in the Mexican courts and sentenced to four years' imprisonment. On October 18, 1966, sixteen months after his arrest, he was released and was returned to his duty station at the Naval Missile Center, where he had been listed as absent without authorization. During his unexcused absence, his pay had been forfeited under 37 U.S.C. 503(a); on his return, his enlistment was extended 484 days to make up the lost time, pursuant to 10 U.S.C. 972 (Pet. App. 1-2).

After his return, a Navy Board of Officers convened to consider whether petitioner should be discharged for misconduct. Such proceedings are mandatory in cases of "[c]onviction by civil authorities (foreign or domestic) or action taken which is tantamount to [a finding of] guilty of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of one year * * * ." 32 C.F.R. 730.13(b)(1). After an evidentiary hearing, the Board recommended that petitioner be discharged (Pet. App. 2).

Petitioner sued in the United States District Court for the Southern District of California to enjoin his discharge. The district court dismissed his complaint, the court of appeals affirmed, *per curiam*, 412 F.2d 1187 (C.A. 9), and this Court denied certiorari, 396 U.S. 973.[1] Petitioner had been retained in the Navy at full pay beyond the scheduled expiration of his enlistment, as extended, while he unsuccessfully exhausted his appellate remedies. In December 1969 petitioner was finally discharged, with a general discharge "under honorable conditions" bearing a code indicating that he was not eligible for reenlistment (Pet. App. 2, 4).

Petitioner applied to the Navy Discharge Review Board to change the character of his discharge and, subsequently, to the Armed Forces Board for the Correction of Military Records for expungement from the Navy's records of all references to his Mexican conviction. Both Boards denied the requested relief.

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[1]An identical action filed by petitioner in August 1969, was dismissed as *res judicata*. *Austin* v. *United States*, No. 69-246-S (S.D. Calif.).

Petitioner brought this action in the Court of Claims in 1974,[2] alleging that his Mexican conviction was based upon a confession obtained by torture. On cross-motions for summary judgment, the Court of Claims dismissed.

1. The Court of Claims correctly dismissed Austin's petition. An enlisted man who, like petitioner, has no statutory or regulatory right to reenlist, may recover back pay for wrongful discharge only from the date of discharge to the date on which the enlistment he was then serving would otherwise have expired. *Rowe* v. *United States*, 167 Ct. Cl. 468, certiorari denied, 380 U.S. 961; *Clackum* v. *United States*, 296 F.2d 226 (Ct. Cl.). Petitioner already had been paid to and beyond the expiration of his enlistment. Thus even if he had been able to establish that his discharge was based upon a mistake in fact, he would not have been entitled to any back pay.[3] Since petitioner under no circumstances would be entitled to a money judgment, the Court of Claims lacked further jurisdiction. *United States* v. *King*, 395 U.S. 1, 2-3; *Glidden Company* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *Alire*, 6 Wall. 573, 575. Although that court is now empowered to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records * * * ," such relief must be "an incident of and collateral to" a money judgment. 28 U.S.C. (Supp. III) 1491.

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[2]In 1972, petitioner sued for a writ of habeas corpus to review his discharge, but the writ was denied because petitioner was not in custody. *Austin* v. *Warner*, 483 F.2d 70 (C.A. 9).

[3]Petitioner makes no claim here that he was entitled to be paid while he was absent from duty.

2. Petitioner asserts that although no statute or regulation affords him a right to reenlist, he nevertheless has a constitutionally protected "property interest" in being able to reenlist. This contention is without merit.

A "property interest" must be rooted elsewhere than in the Constitution, and petitioner is unable to point to any such source for his claimed right to reenlist. As this Court noted in *Board of Regents* v. *Roth*, 408 U.S. 564, 577:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

The facts of the present case are similar to those in *Roth*, for there is nothing in petitioner's enlistment agreement or in any statute or regulation that creates a legitimate claim of entitlement to employment beyond the expiration of his enlistment. Accordingly, petitioner "has no property right in continued military employment because there is no source for it other than his own 'expectancy.'" *Sims* v. *Fox*, 505 F.2d 857, 862 (C.A. 5) (*en banc*), certiorari denied, June 9, 1975, No. 74-1235.

Even if petitioner had a property interest in reenlisting, the only constitutional protection afforded such an interest is that it may not be extinguished without due process, and the requirements of due process were met here. Before his discharge, petitioner had a full hearing at which he was represented by both civilian and military counsel (Pet. App. 2). The Board of Officers that recommended his discharge took petitioner's own testimony and the testimony of three of his witnesses,

and had before it as well a translation of petitioner's Mexican trial transcript (Def. Cross-Mo. for Sum. Judg. Exhs. C, D, and E). In light of this hearing, and the subsequent proceedings before the administrative boards, there is no basis for any contention that petitioner did not receive due process.

But even if the hearing procedures used by the Navy had not complied with due process, petitioner, at this stage, would be entitled not to money damages, but only to a post-discharge hearing. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134; *Sampson* v. *Murray*, 415 U.S. 61. And the Court of Claims lacks equitable jurisdiction to order such a hearing. *United States* v. *King*, *supra*, 395 U.S. at 3-5.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.